

Planning Agreement

The Council of the City of Ryde
ABN 81 621 292 610

Optus Administration Pty Ltd
ACN 055 136 804

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Agreement

Date

Parties

First party

Name	The Council of the City of Ryde (Council)
ACN	81 621 292 610
Contact	The General Manager
Telephone	02 9952 8222

Second party

Name	Optus Administration Pty Ltd (Developer)
ACN	055 136 804
Contact	Alexandra Brook
Telephone	0481 228 571

Background

- A. As at the date of this Agreement, the Developer is the tenant who occupies the Land and is not a registered proprietor of the Land.
- B. On 17 May 2022, the Developer made a Development Application to the Council for development consent to carry out the Development on the Land.
- C. The Development Application was accompanied by an offer dated 11 August 2022 by the Developer to enter into this Agreement to make a Contribution for public purposes if development consent is granted.
- D. Development Consent was granted on 13 October 2022. The deferred commencement conditions require this Agreement to be entered into and registered upon the title to the Land in order to activate the Development Consent.

- E. On 11 August 2023 the Developer made a revised offer to Council to enter into a Planning Agreement whereby it would pay the Contribution for public purposes immediately upon entry into this Agreement, and otherwise on the same terms as the offer dated 11 August 2022.
- F. On 30 November 2023, the Developer made a revised offer to Council to enter into a Planning Agreement whereby it would pay an adjusted Contribution amount, and otherwise on the same terms as the offer dated 11 August 2023.
- G. On 26 September 2023 the Developer made a Modification Application (MOD2023/0197) with Council requesting removal of the deferred commencement condition as to registration of this Agreement on title of the Land.
- H. On 6 December 2023 Council issued consent to the Modification Application.
- I. This Agreement is consistent with the Developer's revised offer referred to in Recital F.

Operative part

1 Definitions

In this Agreement, unless the context indicates a contrary intention:

Act means the *Environmental Planning and Assessment Act 1979* (NSW);

Address means a party's address set out in the Notices clause of this Agreement;

Agreement means this Agreement and any schedules, plans or other attachments to it;

Approval means any approvals, consents, certificates, permits, endorsements, licences, conditions, permissions or requirements (and any modifications or variations to them) which may be required by Law or by any Authority for the commencement and carrying out of any works required under this Agreement or the Development and includes a Development Consent or other approval under the Act;

Authority means any government, semi-governmental, statutory, administrative, fiscal or judicial body, department, commission, authority, tribunal, public or other person, agency or entity and includes a certifier accredited under the *Building and Development Certifiers Act 2018* (NSW);

Bank Guarantee means an irrevocable and unconditional undertaking that is not limited in time and does not expire by one of the following trading banks:

- (a) Australia and New Zealand Banking Group Limited,
- (b) Commonwealth Bank of Australia,

- (c) Macquarie Bank,
- (d) National Australia Bank,
- (e) St George Bank Limited,
- (f) Westpac Banking Corporation, or
- (g) other financial institution approved by the Council at its absolute discretion,

to pay an amount or amounts of money to the Council on demand and containing terms and conditions reasonably acceptable to the Council;

Bond means a documentary performance bond which must be denominated in Australian dollars and be an unconditional undertaking with all the following requirements. It must:

- (a) be signed and issued by an Australian Prudential Regulation Authority (**APRA**) regulated authorised deposit taking institution or an insurer authorised by APRA to conduct new or renewal insurance business in Australia;
- (b) have at all times an investment grade security rating from an industry recognised rating agency of at least:
 - (i) BBB+ (Standard & Poors and Fitch);
 - (ii) Baa 1 (Moody's); or
 - (iii) bbb (Bests);
- (c) be issued on behalf of the Developer;
- (d) have no expiry or end date;
- (e) have the beneficiary as Council;
- (f) be irrevocable;
- (g) state either individually, or in total with other lodged compliant forms of Security, the relevant minimum amount required to be lodged as security; and
- (h) state the purpose of the deposit required in accordance with this Planning Agreement;

Business Day means a day on which banks are open for general banking business in Sydney, excluding Saturdays and Sundays;

Certificate means a Construction Certificate, Occupation Certificate, Subdivision Works Certificate or Subdivision Certificate;

Claim means any claim, loss, liability, damage, proceeding, order, judgment or expense;

Construction Certificate means any construction certificate as defined under section 6.4 of the Act;

Contribution means the payment of an incentive FSR monetary contribution as set out in the Contribution Schedule;

Contribution Schedule means Schedules 2 and Schedules 3;

CPI means the All Groups Consumer Price Index applicable to Sydney published by the Australian Bureau of Statistics;

Damages means all liabilities, losses, damages, costs and expenses, including legal fees and disbursements and costs of investigation, litigation, settlement, judgment, interest and penalties;

Dealing in relation to the Land, means, without limitation, selling, transferring, assigning, mortgaging, charging, encumbering or otherwise dealing with the Land;

Developer means Optus Administration Pty Ltd ACN 055 136 804;

Development is described in the Reference Schedule;

Development Application has the same meaning as in the Act and is LDA2022/0145;

Development Consent has the same meaning as in the Act and includes any Development Consent in relation to the Development Application as modified;

Explanatory Note means the explanatory note relating to and publicly notified with this Agreement, as required by clause 205E of the Regulation;

GST has the same meaning as in the GST Law;

GST Law has the meaning given to that term in *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and any other Act or regulation relating to the imposition of or administration of the GST;

Insolvent means the occurrence of any of the following:

- (a) a party is liquidated, whether compulsorily or voluntarily (other than for the purpose of amalgamation or reconstruction whilst solvent);
- (b) a party becomes unable to pay its debts as they fall due;

- (c) a party enters into any arrangement with creditors;
- (d) a party becomes subject to external administration within the meaning of Chapter 5 of the *Corporations Act 2001* (Cth), including having a receiver or administrator appointed over all or any part of its assets; or
- (e) anything analogous (such as analogous bankruptcy processes) or having a substantially similar effect to the events specified in clauses (a) to (d) above occurs in relation to a party, including the court appointment of a receiver.

Land is described in the Reference Schedule;

Law means:

- (a) any law applicable including legislation, rules, ordinances, codes, regulations, proclamations or by-laws and other subordinate legislation;
- (b) any Approval, including any condition or requirement under it; and
- (c) any fees and charges payable in connection with the things referred to in paragraphs (a) and (b);

LEP means the *Ryde Local Environmental Plan 2014*;

Modification Application means any application to modify the Development Consent under section 4.55 of the Act and is MOD2023/0197;

Occupation Certificate means any occupation certificate as defined under section 6.4 of the Act, and includes an Occupation Certificate issued for part of a building;

Reference Schedule means Schedule 1;

Register means the Torrens title register maintained under the *Real Property Act 1900* (NSW);

Regulation means the *Environmental Planning and Assessment Regulation 2021*;

Security means a Bank Guarantee or Bond;

Subdivision Certificate means a subdivision certificate as defined under section 6.4 of the Act;

Subdivision Works Certificate means a subdivision works certificate as defined under section 6.4 of the Act;

2 Interpretation

In this Agreement, unless the context indicates a contrary intention:

- (a) **(documents)** a reference to this Agreement or another document includes any document which varies, supplements, replaces, assigns or novates this Agreement or that other document;
- (b) **(references)** a reference to a party, clause, paragraph, schedule or annexure is a reference to a party, clause, paragraph, schedule or annexure to or of this Agreement;
- (c) **(headings)** clause headings and the table of contents are inserted for convenience only and do not affect interpretation of this Agreement;
- (d) **(person)** a reference to a person includes a natural person, corporation, statutory corporation, partnership, the Crown and any other organisation or legal entity and their personal representatives, successors, substitutes (including persons taking by novation) and permitted assigns;
- (e) **(party)** a reference to a party to a document includes that party's personal representatives, executors, administrators, successors, substitutes (including persons taking by novation) and permitted assigns;
- (f) **(president, CEO or managing director)** the president, CEO or managing director of a body or Authority means any person acting in that capacity;
- (g) **(requirements)** a requirement to do any thing includes a requirement to cause that thing to be done, and a requirement not to do any thing includes a requirement to prevent that thing being done;
- (h) **(including)** including and includes are not words of limitation, and a list of examples is not limited to those items or to items of a similar kind;
- (i) **(corresponding meanings)** a word that is derived from a defined word has a corresponding meaning;
- (j) **(singular)** the singular includes the plural and vice-versa;
- (k) **(gender)** words importing one gender include all other genders;
- (l) **(parts)** a reference to one or more things includes each part and all parts of that thing or group of things but nothing in this clause implies that part performance of an obligation constitutes performance of that obligation;
- (m) **(rules of construction)** neither this Agreement nor any part of it is to be construed against a party on the basis that the party or its lawyers were responsible for its drafting;

- (n) **(legislation)** a reference to any legislation or provision of legislation includes all amendments, consolidations or replacements and all regulations or instruments issued under it;
- (o) **(time and date)** a reference to a time or date in connection with the performance of an obligation by a party is a reference to the time and date in , Australia, even if the obligation is to be performed elsewhere;
- (p) **(joint and several)** an agreement, representation, covenant, right or obligation:
 - (i) in favour of two or more persons is for the benefit of them jointly and severally; and
 - (ii) on the part of two or more persons binds them jointly and severally;
- (q) **(writing)** a reference to a notice, consent, request, approval or other communication under this Agreement or an agreement between the parties means a written notice, request, consent, approval or agreement;
- (r) **(replacement bodies)** a reference to a body (including an institute, association or Authority) which ceases to exist or whose powers or functions are transferred to another body is a reference to the body which replaces it or which substantially succeeds to its power or functions;
- (s) **(Australian currency)** a reference to dollars or \$ is to Australian currency;
- (t) **(month)** a reference to a month is a reference to a calendar month; and
- (u) **(year)** a reference to a year is a reference to twelve consecutive calendar months.

3 Planning Agreement under the Act

- (a) The parties agree that this Agreement is a planning agreement within the meaning of section 7.4 of the Act.
- (b) Schedule 4 of this Agreement summarises the requirements for planning agreements under section 7.4 of the Act and the way this Agreement addresses those requirements.

4 Application of this Agreement

This Agreement applies to:

- (a) the Development, and
- (b) the Land.

5 Operation of this Agreement

This Agreement commences on and from the date it is executed by all parties.

6 Contributions to be made under this Agreement

- (a) The Developer must deliver the Contribution to Council at the time and in the manner set out in the Contribution Schedule.
- (b) The parties acknowledge and agree that the Contribution serves the public purposes set out in the Contribution Schedule.
- (c) The parties acknowledge and agree that the Developer will pay the whole of the Contribution to Council immediately upon entering into this Agreement.

7 Application of s 7.11, s 7.12 and s 7.24 of the Act

- (a) This Agreement does not exclude the application of sections 7.11, 7.12 and 7.24 of the Act to the Development to the extent set out in the Reference Schedule.
- (b) Any Contributions made under this Agreement are not to be taken into account when determining any development contribution under section 7.11 or 7.12 of the Act.

8 Registration of this Agreement

8.1 *Intentionally Deleted*

8.2 *Registration of this Agreement*

- (a) Subject to subclause (e), the Developer agrees to promptly do all things that are necessary to procure the registration of this Agreement under the *Real Property Act 1900* (NSW) in the relevant folios of the Register of the Land in accordance with section 7.6 of the Act.
- (b) Subject to subclause (e), the Developer at its own expense will, promptly after the execution of this Agreement, take all practical steps, and otherwise do anything that the Council reasonably requires to procure:
 - (i) the consent of each person who:
 - (A) has an estate or interest in the Land registered under the *Real Property Act 1900* (NSW); or
 - (B) is seized or possessed of an estate or interest in the Land,

- (ii) the execution of any documents; and
 - (iii) the production of the relevant duplicate certificates of title or electronic equivalents,
- to enable the registration of this Agreement in accordance with clause 8.2.
- (c) Subject to subclause (e), the Developer warrants to Council that the Developer will procure consent of the registered proprietor of the Land and all other necessary parties to the registration of the Agreement in accordance with this clause 8.2.
 - (d) Subject to subclause (e), the Developer, at its own expense, will take all practical steps, and otherwise do anything that the Council reasonably requires:
 - (i) to procure the lodgement of this Agreement with the Registrar-General as soon as reasonably practicable after the date of this Agreement, but in any event, no later than 10 Business Days after that date; and
 - (ii) to procure the registration of this Agreement by the Registrar-General in the relevant folios of the Register for the Land as soon as reasonably practicable after this Agreement is lodged for registration.
 - (e) Notwithstanding any other provision herein, if the Developer has paid the Contribution in full at the time of entering into this Agreement in compliance with Clause 6 (c) and met its obligations as to Council's costs under Clauses 16.6(a)(i) and 16.6(a)(ii), then there shall be no requirement for:
 - (i) registration of the Agreement in accordance with this clause 8.2;
 - (ii) provision of Security under clause 11.2;
 - (iii) restrictions on sale or transfer of Land in accordance with clause 12.2; and
 - (iv) the provisions of clauses 8.2(a)-(d) will not apply.

8.3 *Removal from Register*

Subject to clause 8.2(e) herein, once Council is satisfied the Developer has fully complied with all of its obligations under this Agreement, Council must within 20 Business Days of being requested to do so by the Developer, provide a full release and discharge of this Agreement with respect to the whole of the Land and documentation required to remove the notation of this Agreement on title to the Land;

9 Review of this Agreement

- (a) This Agreement may be reviewed or modified. Any review or modification of this Agreement will be conducted in the circumstances and in the manner determined by the parties.
- (b) No modification or review of this Agreement will be of any force or effect unless it is in writing, exhibited in accordance with the Regulation and signed by the parties to this Agreement.
- (c) A party is not in breach of this Agreement if it does not agree to an amendment to this Agreement requested by a party in, or as a consequence of, a review.

10 Dispute Resolution

10.1 *Reference to Dispute*

If a dispute arises between the parties in relation to this Agreement, the parties must not commence any court proceedings relating to the dispute unless the parties have complied with this clause, except where a party seeks urgent interlocutory relief.

10.2 *Notice of Dispute*

The party wishing to commence the dispute resolution process must give written notice (**Notice of Dispute**) to the other parties of:

- (a) The nature of the dispute,
- (b) The alleged basis of the dispute, and
- (c) The position which the party issuing the Notice of Dispute believes is correct.

10.3 *Representatives of Parties to Meet*

- (a) The representatives of the parties must promptly (and in any event within 15 Business Days of the Notice of Dispute) meet in good faith to attempt to resolve the notified dispute.
- (b) The parties may, without limitation:
 - (i) resolve the dispute during the course of that meeting,
 - (ii) agree that further material or expert determination in accordance with clause 10.6 about a particular issue or consideration is needed to effectively resolve the dispute (in which event the parties will, in good faith, agree to a timetable for resolution); or

- (iii) agree that the parties are unlikely to resolve the dispute and, in good faith, agree to a form of alternative dispute resolution (including expert determination, arbitration or mediation) which is appropriate for the resolution of the relevant dispute.

10.4 *Further Notice if Not Settled*

If the dispute is not resolved within 15 Business Days after the nominated representatives have met, either party may give to the other a written notice calling for determination of the dispute (**Determination Notice**) by mediation under clause 10.5 or by expert determination under clause 10.6.

10.5 *Mediation*

If a party gives a Determination Notice calling for the dispute to be mediated:

- (a) The parties must agree to the terms of reference of the mediation within 10 Business Days of the receipt of the Determination Notice (the terms shall include a requirement that the mediation rules of the Institute of Arbitrators and Mediators Australia (NSW Chapter) apply;
- (b) The mediator will be agreed between the parties, or failing agreement within 10 Business Days of receipt of the Determination Notice, either Party may request the President of the Institute of Arbitrators and Mediators Australia (NSW Chapter) to appoint a mediator;
- (c) The mediator appointed pursuant to this clause 10.5 must:
 - (i) have reasonable qualifications and practical experience in the area of the dispute; and
 - (ii) have no interest or duty which conflicts or may conflict with his or her function as a mediator he or she being required to fully disclose any such interest or duty before his or her appointment;
- (d) The mediator shall be required to undertake to keep confidential all matters coming to his or her knowledge by reason of his or her appointment and performance of his or her duties;
- (e) The parties must within 10 Business Days of receipt of the Determination Notice notify each other of their representatives who will be involved in the mediation (except if a resolution of Council is required to appoint a representative, Council must advise of the representative within 5 Business Days of the resolution);
- (f) The parties agree to be bound by a mediation settlement and may only initiate judicial proceedings in respect of a dispute which is the subject of a mediation settlement for the purpose of enforcing that mediation settlement; and
- (g) In relation to costs and expenses:
 - (i) each party will bear its own professional and expert costs incurred in connection with the mediation; and

- (ii) the costs of the mediator will be shared equally by the parties unless the mediator determines that a party has engaged in vexatious or unconscionable behaviour in which case the mediator may require the full costs of the mediation to be borne by that party.

10.6 *Expert determination*

If the dispute is not resolved under clause 10.3 or clause 10.5, or the parties otherwise agree that the dispute may be resolved by expert determination, the parties may refer the dispute to an expert, in which event:

- (a) the dispute must be determined by an independent expert in the relevant field:
 - (i) agreed upon and appointed jointly by the parties; and
 - (ii) in the event that no agreement is reached or no appointment is made within 10 Business Days of the agreement to refer the dispute to an expert, appointed on application of a party by the then President of the Law Society of New South Wales;
- (b) the expert must be appointed in writing and the terms of the appointment must not be inconsistent with this clause;
- (c) the determination of the dispute by such an expert will be made as an expert and not as an arbitrator and will be in writing and contain the reasons for the determination;
- (d) the expert will determine the rules for the conduct of the process but must conduct the process in accordance with the rules of natural justice;
- (e) each party will bear its own costs in connection with the process and the determination by the expert and will share equally the expert's fees and costs; and
- (f) any determination made by an expert pursuant to this clause is final and binding upon the parties except unless:
 - (i) within 20 Business Days of receiving the determination, a party gives written notice to the other party that it does not agree with the determination and commences litigation; or
 - (ii) the determination is in respect of, or relates to, termination or purported termination of this Agreement by any party, in which event the expert is deemed to be giving a non-binding appraisal.

10.7 *Litigation*

If the dispute is not *finally* resolved in accordance with this clause 10, then either party is at liberty to litigate the dispute.

10.8 No suspension of contractual obligations

Subject to any interlocutory order obtained under clause 10.1, the referral to or undertaking of a dispute resolution process under this clause 10 does not suspend the parties' obligations under this Agreement.

11 Enforcement

11.1 Default

- (a) In the event Council considers the Developer has failed to perform and fulfil an obligation under this Agreement, it may give notice in writing to the relevant party (**Default Notice**) giving all particulars of the matters in respect of which it considers default has occurred and by such notice require the default to be remedied within a reasonable time, not being less than 10 Business Days.
- (b) In determining a reasonable time, regard must be had to both the nature of the default and the work or other action required to remedy it and whether or not the continuation of the default constitutes a public nuisance or raises other circumstances of urgency or emergency.
- (c) If a party disputes the Default Notice it may refer the dispute to dispute resolution under clause 10 of this Agreement.
- (d) If the Developer fails to comply with a Default Notice, Council may, to the extent possible, perform the obligations the Developer has failed to fulfil in accordance with the Default Notice and do anything which the Developer should have done under this Agreement in relation to the Developer obligations the subject of the Default Notice.
- (e) The Developer indemnifies and will keep the Council indemnified from and against all Claims and Damages reasonably incurred by Council and Council may call on any Security provided to it under clause 11.2 to satisfy any Claim under this clause.

11.2 Security

- (a) The Developer must provide to Council Security for the delivery of the Contribution as specified in the Contribution Schedule.
- (b) Council may reject any Security provided by the Developer that is expressed as expiring on a certain date, in which case the Developer will be taken not to have satisfied its obligation to provide the Security under this Agreement.
- (c) The Council may call on a Security provided under this clause if:
 - (i) the Developer has been issued with a Default Notice under clause 11.1 and failed to rectify the default in accordance with that notice; or
 - (ii) the Developer becomes Insolvent.

- (d) Within 20 Business Days of each anniversary of a Security provided under clause (a), the Developer must provide Council with one or more replacement Securities in an amount calculated in accordance with the following:

$$A = \frac{B \times D}{C}$$

Where:

A is the amount of the replacement Security,

B is the amount of the Security to be replaced,

C is the CPI for the quarter ending immediately before the date of the Security to be replaced,

D is the CPI for the quarter ending immediately before the date of the replacement Security,

provided A is greater than B.

- (e) On receipt of a replacement Security provided under clause 11.2(d), the Council must release and return to the Developer, as directed, the Security that has been replaced as soon as reasonably practicable.
- (f) At any time following the provision of a Security under this clause, the Developer may provide the Council with one or more replacement Securities totalling the amount of all Securities required to be provided under this clause for the time being. On receipt of such replacement Security, the Council must release and return to the Developer, as directed, the Securities which it holds that have been replaced as soon as reasonably practicable.
- (g) Subject to this clause and the provisions of this Agreement, the Council may apply the proceeds of a Security in satisfaction of:
- (i) any obligation of the Developer or Landowner under this Agreement to which the Security applies, and
 - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this Agreement.
- (h) The Council must promptly return a Security provided under this clause if requested by the Developer and the Developer has delivered the Contribution to which the Security applies to the Council's satisfaction.
- (i)

- (i) The provision of a Security under this clause does not relieve the Developer from any of its other obligations under this Agreement.
- (j) Nothing in this clause 11.2 prevents or restricts the Council from taking any enforcement action in relation to:
 - (i) any obligation of the Developer under this Agreement; or
 - (ii) any associated liability, loss, cost, charge or expense directly or indirectly incurred by the Council because of the failure by the Developer to comply with this Agreement,that is not or cannot be satisfied by calling on a Security.

11.3 *Restriction on the issue of Certificates*

- (a) If the Contribution Schedule specifies that:
 - (i) the Contribution; or
 - (ii) the Securitymust be delivered prior to the issue of a Certificate, in accordance with provisions of the Act and Regulation, the relevant Certificate must not be issued unless the Contribution or Security has been delivered.
- (b) If a Default Notice has been issued by Council under clause 11.1 and the Developer has failed to rectify the default, a Certificate must not be issued for any part of the Development until the default has been rectified to the satisfaction of Council or any dispute about the Default Notice has been finally resolved.

11.4 *General Enforcement*

- (a) Without limiting any other remedies available to the parties, this Agreement may be enforced by any party in any Court of competent jurisdiction.
- (b) Nothing in this Agreement prevents:
 - (i) a party from bringing proceedings in the Land and Environment Court to enforce any aspect of this Agreement or any matter to which this Agreement relates; and
 - (ii) the Council from exercising any function under the Act or any other Act or law relating to the enforcement of any aspect of this Agreement or any matter to which this Agreement relates.

12 Assignment and Dealings

12.1 Assignment

- (a) A party must not assign or deal with any right under this Agreement without the prior written consent of the other parties.
- (b) Any change of ownership or control (as defined in section 50AA of the *Commonwealth Corporations Act 2001*) of a party (excluding the Council) shall be deemed to be an assignment of this Agreement for the purposes of this clause.
- (c) Any purported dealing in breach of this clause is of no effect.

12.2 Transfer of interest in Land

- (a) The Developer may not transfer, assign or dispose of the whole or any part of its right, title or interest in the Land (present or future) or in the Development to another person (**Transferee**) unless before it sells, transfers or disposes of that right, title or interest:
 - (i) it satisfies the Council that the proposed Transferee is financially capable of complying with its obligations under this Agreement;
 - (ii) it satisfies the Council that the rights of the Council will not be diminished or fettered in any way;
 - (iii) the Transferee delivers to the Council a novation deed signed by the Transferee in a form and of such substance as is acceptable to the Council containing provisions under which the Transferee agrees to comply with all the outstanding obligations of the Developer and Landowner under this Agreement and to be bound by the terms and condition of this Agreement as if the Transferee had executed this Agreement;
 - (iv) the Transferee provides to the satisfaction of Council any Security required under clause 11.2 to secure the outstanding obligations under this Agreement;
 - (v) the Transferee provides to the satisfaction of Council copies of insurances or other documents required under this Agreement for the carrying out of any Works;
 - (vi) the Developer must pay the Council's reasonable costs in relation to any transfer or assignment.

13 Approvals and consents

Except as otherwise set out in this Agreement, and subject to any statutory obligations, a party may give or withhold an approval or consent to be given under this Agreement in that party's absolute discretion and subject to any conditions determined by the party. Subject to statutory requirements, a party is not obligated to give its reasons for giving or withholding consent or for giving consent subject to conditions.

14 No fetter

14.1 Discretion

This Agreement is not intended to operate to fetter, in any manner, the exercise of any statutory power or discretion of the Council, including, but not limited to, any statutory power or discretion of the Council relating to the Development Application and Development Consent or any other application for Approval (all referred to in this Agreement as a “**Discretion**”).

14.2 No fetter

- (a) Nothing in this Agreement is to be construed as requiring an Authority to do anything that would cause it to be in breach of any of its obligations at Law.
- (b) Nothing in this Agreement is to be construed as limiting or fettering in any way the exercise of Discretion.
- (c) Nothing in this Agreement imposes any obligation on an Authority to exercise any function or power under the Act.
- (d) If, contrary to the operation of this clause, any provision of this Agreement is held by a court of competent jurisdiction to constitute a fetter on any Discretion, the parties agree:
 - (i) they will take all practical steps, including the execution of any further documents, to ensure the objective of this clause is substantially satisfied,
 - (ii) in the event that (a) cannot be achieved without giving rise to a fetter on the exercise of a Discretion, the relevant provision is to be severed and the remainder of this Agreement has full force and effect, and
 - (iii) to endeavour to satisfy the common objectives of the parties in relation to the provision of this Agreement which is to be held to be a fetter on the extent that is possible having regard to the relevant court judgment.

15 Notices

15.1 Notices

Any notice given under or in connection with this Agreement (**Notice**):

- (a) must be in writing and signed by a person duly authorised by the sender;

- (b) must be addressed and delivered to the intended recipient by hand, by prepaid post or by email at the address specified in the Reference Schedule, or at the address last notified by the intended recipient to the sender after the date of this Agreement;
- (c) is taken to be given or made:
 - (i) in the case of hand delivery, when delivered;
 - (ii) in the case of delivery by post, three Business Days after the date of posting (if posted to an address in the same country) or seven Business Days after the date of posting (if posted to an address in another country); and
 - (iii) in the case of email when the sender receives an email acknowledgement from the recipient's information system showing the Notice has been delivered to the email address or when the Notice is first opened or read by the recipient, whichever occurs first.
- (d) if under clause (c) a Notice would be taken to be given or made on a day that is not a Business Day in the place to which the Notice is sent, or later than 4.00 pm (local time), it is taken to have been given or made at the start of business on the next Business Day in that place.

15.2 *Change of address*

If a party gives another party 3 Business Days' notice of a change of its address or email address, any notice, consent, information, application or request is only given or made by that other party if it is delivered, posted or emailed to the latest address or email address.

16 General

16.1 *Relationship between parties*

- (a) Nothing in this Agreement:
 - (i) constitutes a partnership between the parties; or
 - (ii) except as expressly provided, makes a party an agent of another party for any purpose.
- (b) A party cannot in any way or for any purpose:
 - (i) bind another party; or
 - (ii) contract in the name of another party.
- (c) If a party must fulfil an obligation and that party is dependent on another party, then that other party must do each thing reasonably within its power to assist the other in the performance of that obligation.

16.2 Schedules and Annexures

The parties agree that all the Schedules and Annexures form part of this Agreement and to agree to comply with the provisions of those Schedules and Annexures.

16.3 Time for doing acts

- (a) If the time for doing any act or thing required to be done or a notice period specified in this Agreement expires on a day other than a Business Day, the time for doing that act or thing or the expiration of that notice period is extended until the following Business Day.
- (b) If any act or thing required to be done is done after 5.00 pm on the specified day, it is taken to have been done on the following Business Day.

16.4 Further assurances

Each party must promptly execute all documents and do all other things reasonably necessary or desirable to give effect to the arrangements recorded in this Agreement.

16.5 Variation

A provision of this Agreement can only be varied by a later written document executed by or on behalf of all parties and in accordance with the provisions of the Act.

16.6 Legal expenses and stamp duty

- (a) The Developer must pay the Council's costs (including legal costs) and disbursements in connection with:
 - (i) the drafting, negotiation, preparation, execution, carrying into effect, and registration (if required) of this Agreement;
 - (ii) the cost of any legal advice obtained in connection with this Agreement;
 - (iii) exercising, enforcing or preserving or attempting to exercise, enforce or preserve rights under this Agreement, including in connection with the default of the Developer; and
 - (iv) any waiver, variation, release or discharge of this Agreement.
- (b) The Developer must pay or reimburse Council on demand for taxes and fees (including without limitation registration fees and stamp duty) and fines and penalties in respect of fees which may be payable or determined to be payable in connection with this Agreement or a payment or receipt or any transaction contemplated by this Agreement.

- (c) In order to facilitate the Developer meeting its obligations under clause 8.2(e) of this Agreement (at the time of entering into this Agreement) the Council must provide itemised bills for any claim for reimbursement of its costs under Clauses 16.6(a)(i) and/or 16.6(a)(ii), five (5) Business Days prior to the anticipated date that the parties will enter into this Agreement.

16.7 *Entire Agreement*

The contents of this Agreement constitute the entire agreement between the parties and supersede any prior negotiations, representations, understandings or arrangements made between the parties regarding the subject matter of this Agreement, whether orally or in writing.

16.8 *Representations and warranties*

- (a) Each party individually represents and warrants that:
 - (i) it has power to enter into this Agreement and comply with its obligations under this Agreement;
 - (ii) it has in full force and effect the authorisations necessary for it to enter into this Agreement, to comply with its obligations and to exercise its rights under this Agreement and to allow this Agreement to be enforced; and
 - (iii) its obligations under this Agreement are valid and binding and are enforceable against it in accordance with the terms of this Agreement;
- (b) Each party acknowledges that the other party has entered into this Agreement in reliance on the representations and warranties in this clause.

16.9 *Severability*

- (a) If a clause or part of a clause of this Agreement can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid, it must be read in the latter way.
- (b) If any clause or part of a clause is illegal, unenforceable or invalid, that clause or part is to be treated as removed from this Agreement, but the rest of this Agreement is not affected.

16.10 *Invalidity*

- (a) A word or provision must be read down if:
 - (i) this Agreement is void, voidable, or unenforceable if it is not read down;
 - (ii) this Agreement will not be void, voidable or unenforceable if it is read down; and
 - (iii) the provision is capable of being read down.

- (b) A word or provision must be severed if:
 - (i) despite the operation of clause (a), the provision is void, voidable or unenforceable if it is not severed; and
 - (ii) this Agreement will be void, voidable or unenforceable if it is not severed.
- (c) The remainder of this Agreement has full effect even if clause 16.10(b) applies.

16.11 Waiver

- (a) A right or remedy created by this Agreement cannot be waived except in writing signed by the party entitled to that right. Delay by a party in exercising a right or remedy does not constitute a waiver of that right or remedy, nor does a waiver (either wholly or in part) by a party of a right operate as a subsequent waiver of the same right or of any other right of that party.
- (b) The fact that a Party fails to do, or delays in doing, something the Party is entitled to do under this Agreement, does not amount to a waiver of any obligation of, or breach of obligation by, another Party. A waiver by a Party is only effective if it is in writing. A written waiver by a Party is only effective in relation to the particular obligation or breach in respect of which it is given. It is not to be taken as an implied waiver of any other obligation or breach or as an implied waiver of that obligation or breach in relation to any other occasion.

16.12 GST

- (a) Words and expressions which are not defined in this Agreement but which have a defined meaning in GST Law have the same meaning as in the GST Law.
- (b) Unless otherwise expressly stated, all prices or other sums payable or consideration to be provided under this Agreement are exclusive of GST.
- (c) The parties agree, in accordance with Class Ruling CR2013/13 published by the Commissioner, that the Contribution required to be made under this Agreement is exempt from GST.
- (d) If GST is imposed on any supply made under or in accordance with this Agreement, the Developer must pay the GST or pay to the Council an amount equal to the GST payable on or for the taxable supply, whichever is appropriate in the circumstances.
- (e) This clause will not merge on completion or termination of this Agreement.

16.13 Governing law and jurisdiction

- (a) The laws applicable in New South Wales govern this Agreement.

- (b) The parties submit to the non-exclusive jurisdiction of the courts of New South Wales and any courts competent to hear appeals from those courts.

16.14 Confidentiality

The parties agree that the terms of this Agreement are not confidential, and this Agreement may be treated as a public agreement and exhibited or reported without restriction by any party.

Schedule 1

Reference Schedule

Item	Reference Information
Council Contact Details	Address: Riverview Business Park, Building 0, Level 1, 3 Richardson Place, North Ryde Email: PaulK@ryde.nsw.gov.au Contact: Paul Kapetas
Developer Contact Details	Address: 1 Lyonpark Road, Macquarie Park Email: Alexandra.Brook@optus.com.au Contact: Alexandra Brook
Development	Construction of a single storey pavilion building and walkway, associated demolition works, landscaping, access and drainage works within the existing Optus Campus.
Land	Lot 511 DP 1153119, known as 1 Lyonpark Road, Macquarie Park as shown on the plan at Annexure A
Exclusion of Section 7.11	This Agreement does not exclude the application of section 7.11 of the Act to the Development.
Exclusion of Section 7.12	This Agreement does not exclude the application of section 7.12 of the Act to the Development.
Exclusion of Section 7.24	This Agreement does not exclude the application of section 7.24 of the Act to the Development.

Schedule 2 Contribution Schedule

Contribution	Public Purpose	Nature and Extent	Timing	Manner of Delivery	Security Required	Timing of Security
Incentive FSR Monetary Contribution in the amount of \$122,000 at the date of this Agreement (subject to CPI increases).	Contributions to be used towards the embellishment of public parks and open spaces in Macquarie Park and / or the Macquarie Park Access Network as described in part 4.5 of the <i>Ryde Development Control Plan 2014</i> , at Council's discretion, in particular, Catherine Hamlin Park or Wilga Park/Shrimpton's Creek.	The Incentive FSR Monetary Contribution calculated in accordance with Schedule 3.	The Incentive FSR Monetary Contribution is to be paid to Council immediately upon entering into this Agreement.	The Incentive FSR Monetary Contribution is to be paid to Council in accordance with Schedule 3.	If the Incentive FSR Monetary Contribution is not paid immediately upon entering into this Agreement, then the Developer must provide a Bank Guarantee or Bond for the full amount of the Contribution upon entering into this Agreement and in any event prior to issue of any Construction certificate for the Development.	Upon entering into this Agreement, if Security is required under this Schedule.

Schedule 3 Incentive FSR Monetary Contributions

1 Definitions

1.1 In this Schedule:

IFSR Rate means the rate of \$305.00 per sqm;

Incentive GFA means the Total GFA minus the Base GFA, being 400 sqm; and

2 Calculation of Monetary Contributions

2.1 The Incentive FSR Monetary Contribution is to be calculated in accordance with the following formula:

$$\text{Incentive FSR Monetary Contribution} = \text{Incentive GFA} \times \text{IFSR Rate}$$

2.2 The Incentive FSR Monetary Contribution is to be indexed in accordance with increases in the CPI from the date of this Agreement to the date of payment in accordance with the following formula:

$$\begin{array}{ccccc} \text{Amount to be} & & & & \text{The CPI at the time of} \\ \text{paid (Incentive} & & & & \text{payment} \\ \text{FSR Monetary} & = & \text{Amount specified} & \times & \hline \text{Contribution)} & & \text{in Schedule 2} & & \text{The CPI at the date of this} \\ & & & & \text{Agreement} \end{array}$$

3 Manner of Delivery

3.1 The Incentive FSR Monetary Contribution must be paid by way of bank cheque in favour of Council or by deposit by means of electronic funds transfer into an account specified by Council.

3.2 The Incentive FSR Monetary Contribution will be taken to have been made when the Council notifies the Developers in writing that the bank cheque has been received and cleared funds or electronic funds have been deposited in the Council's bank account.

Schedule 4

Summary of requirements (section 7.4)

Subject and subsection of the Act	Planning Agreement
<p>Planning instrument and/or Development Application – Section 7.4(1)</p> <p>The Developer has:</p> <p>(a) Sought a change to an environmental planning instrument</p> <p>(b) Made, or propose to make a Development Application</p> <p>(c) Entered into an Agreement with, or are otherwise associated with, a person to whom paragraph (a) or (b) applies</p>	<p>No</p> <p>Yes</p> <p>No</p>
<p>Description of the land to which the planning Agreement applies – Section 7.4(3)(a)</p>	<p>Refer to Schedule 1 and Annexure A</p>
<p>A description of the development to which the Planning Agreement applies – Section 7.4(3)(b)</p>	<p>Refer to Schedule 1</p>
<p>The scope, timing and manner of delivery of contribution required by the Planning Agreement – Section 7.4(3) (c)</p>	<p>Refer to Schedule 2</p>
<p>Applicability of section 7.11 of the Act – Section 7.4(3)(d)</p>	<p>Refer to clause 7 and Schedule 1</p>
<p>Applicability of section 7.12 of the Act – Section 7.4(3)(d)</p>	<p>Refer to clause 7 and Schedule 1</p>
<p>Applicability of section 7.24 of the Act – Section 7.4(3)(d)</p>	<p>Refer to clause 7 and Schedule 1</p>
<p>Whether benefits are to be taken into consideration when determination development contributions – Section 7.4(3)(e)</p>	<p>Refer to clause 7(b)</p>
<p>Mechanism for dispute resolution – Section 7.4(3)(f)</p>	<p>Refer to clause 10</p>
<p>Enforcement of the Planning Agreement – Section 7.4(3)(g)</p>	<p>Refer to clause 11</p>
<p>Registration of the Planning Agreement – Section 7.4(3)(g)</p>	<p>Refer to clause 8</p>
<p>No obligation to grant consent or exercise functions – Section 7.4(9)</p>	<p>Refer to clause 14 (no fetter)</p>

Executed as an agreement

COUNCIL OF THE CITY OF RYDE (ABN 18 621 292 610) by the Chief Executive Officer under delegated authority pursuant to Section 377 of the Local Government Act 1993, in the presence of:

Witness

Witness Name:

Wayne Rylands

Chief Executive Officer

OPTUS ADMINISTRATION PTY LTD (ACN 055 136 804) in accordance with section 127 of the Corporations Act 2001

[Name of Director/Secretary]

[Director/Secretary]

[Name of Director]

Director